SUPREME COURT, U. S.

Supreme Court, U.S.
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Nos. 669, ET AL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 669

MUNICIPAL DISTRIBUTOR GROUP,
Petitioner,

v.

FEDERAL POWER COMMISSION, ET AL.,
Respondents.

No. 691

ASSOCIATED GAS DISTRIBUTORS,
Petitioners,

v.

AUSTRAL OIL COMPANY, ET AL.,
Respondents.

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

AMERADA HESS CORPORATION, ET AL.,
Respondents.

BRIEF OF RESPONDENTS BRADCO PROPERTIES, INC., et al., IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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October 14, 1970

INDEX

	PAGE
Statement	2
Argument	6
I. The Court of Appeals' Disposition Under the Opinion of June 16, 1970, Was Within Its Authority Under Section 19(b) of the Natural Gas Act	8
II. The Disposition Under the June 16, 1970, Opinion Does Not Present Conflicts With Decisions of this Court or of the Courts of Appeals	12
III. NYPSC Does Not Present a Substantial Question Involving Commission Prescription of Area Rates	14
IV. Disposition Under the Opinion of June 16, 1970, Permits a Result Consistent With the Public Interest and Commission Responsibility for Natural Gas Supply	16
V. If the Disposition Under Its Opinion of June 16, 1970, Was Beyond the Power of the Court of Appeals, Then the Court of Appeals Should Be Given the Opportunity or Required to Reconsider Its "Affirmance"	19
Conclusion	20

LIST OF AUTHORITIES

Cases

Arizona Grocery Co. v. Atchison, Topeka, & Santa Fe R. Co., 284 U.S. 370 (1932)	13
Arkadelphia Milling Company v. St. Louis Sw. Ry. Co., 249 U.S. 134 (1919)	11
Brown v. Swann, 35 U.S. (10 Pet.) 497 (1836)	11
Butterick Co. v. Federal Trade Commission, 4 F.2d 910 (2d Cir. 1925)	12
Century Metalcraft Corporation v. Federal Trade Commission, 112 F.2d 443 (7th Cir. 1940)	11
Chamber of Commerce v. Federal Trade Commission, 13 F.2d 673 (8th Cir. 1926)	12
Dolcin Corporation v. Federal Trade Commission, 219 F.2d 742 (D. C. Cir. 1954), cert. den. 348 U.S. 981 (1955)	10
Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944)	13
Federal Power Commission v. Interstate Natural Gas Co., 336 U.S. 577 (1949)	7

PAGE

Federal Power Commission v. Sunray DX Oil Co., 391 U.S. 9 (1968) 13

Federal Trade Commission v. Balme, 23 F.2d 615 (2d Cir. 1928), cert. den., 277 U.S. 598 (1928) 12

Ford Motor Company v. National Labor Relations Board, 305 U.S. 364 (1939) 10, 11

Hamilton-Brown Shoe Co. v. National Labor Relations Board, 104 F.2d 49 (8th Cir. 1939) 10

Indiana Quartered Oak Co. v. Federal Trade Commission, 58 F.2d 182 (2d Cir. 1932) 12

International Union v. Eagle-Picher M. & S. Co., 325 U.S. 335 (1945) 13

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) 13

National Labor Relations Board v. Central Mercedita, Inc., 273 F.2d 370 (1st Cir. 1959) 10

Natural Gas Pipeline Co. of America v. Federal Power Commission, 128 F.2d 481 (7th Cir. 1942) 11

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 2, 3, 14, 15, 17

Porter v. Warner Holding Company, 328 U.S. 395 (1946) 11

L. B. Silver Co. v. Federal Trade Commission, 292 F.752 (6th Cir. 1923) 12

State Corporation Commission of Kansas v. Federal Power Commission, 215 F.2d 176 (8th Cir. 1954) 13

Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 13

United States v. Brown, 331 F.2d 362 (10th Cir. 1964) 10

United States v. Morgan, 307 U.S. 183 (1939) 11

Administrative Decisions

Area Rate Proceeding, Docket No. AR64-1, Opinion No. 586, Decision issued September 18, 1970 17

Statutes

Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U.S.C. 41 11

Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w

Section 16 ..... 3, 9

Section 19(b) 5, 8, 9, 10, 11, 12, 13

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October Term, 1970

No. 669

Municipal Distributor Group,
Petitioner.

v.

Federal Power Commission, et al.,
Respondents.

No. 691

Associated Gas Distributors,
Petitioners.

v.

Austral Oil Company, et al.,
Respondents.

No. 692

Public Service Commission of the State of New York,
Petitioner.

v.

Amerada Hess Corporation, et al.,
Respondents.

BRIEF OF RESPONDENTS BRADCO PROPERTIES, INC., et al., IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Bradco Properties, Inc., Freeport Sulphur Company, John W. Mecom, Lake Washington Inc., U. S. Oil of Louisiana Inc. and U. S. Oil of Louisiana, Ltd. (Bradco, *et al.*), respondents in Nos. 669, 691 and 692, and petitioners in No. 683, hereby submit their brief in opposition to the petitions filed in Nos. 669, 691 and 692 for writs of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 19, 1970.

STATEMENT

This brief is submitted in opposition to the petitions for writs of certiorari filed by the Municipal Distributor Group (MDG), the Associated Gas Distributors (AGD) and the Public Service Commission of the State of New York (NYPSC). Those petitioners have set forth parts of the history of the case before the Commission and the Court of Appeals. In their petition filed in No. 683, Bradco, *et al.*, have set forth a more complete statement of this case, which such statement is not here repeated but reference is here respectfully made to the same. Those portions of that history which are most pertinent to the questions presented in Nos. 668, 691 and 692 are as follows:

In its March 19, 1970, opinion, the Court of Appeals found defect after defect in the Commission's opinions and orders under review. On the "most serious issue" involving Commission findings (or lack thereof) and legal standards — termed "the supply problem" by the court — the Court of Appeals recognized that this Court held in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), that "adequate findings" would be required in the future, and noted that the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. The Court of Appeals also specifically found ". . . the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Continental Appendix A, pp. 49-50),[1] and

[1] Petitioners Continental Oil Company, *et al.*, have filed in No. 669 Appendices to their Petition for Writ of Certiorari containing the complete text of opinions and judgment below, the agency opinions and orders and statutes involved. References herein to "Continental Appendix" are to that document. Petitioners Continental Oil Company, *et al.*, have also filed forty copies of the Joint Appendix in the Court of Appeals which consisted of four volumes designated as Part I and two volumes designated as Part II. A citation here to "III J.A. (1)

(Continued)

laid bare other defects in "findings" (or lack thereof) on related questions of supply, demand and actual availability of capital to the industry at rates prescribed (Continental Appendix A, pp. 52-69). The Court of Appeals also noted existence of more current data then and now available to the Commission, including the study by the Commission's own Staff released in October, 1969, indicating "perhaps a certainty, that the supply of gas is dangerously low" and that "a serious shortage, in fact, may already be unavoidable" (Continental Appendix A, p. 52). The court found that assessment of crucial facts as to supply, demand and impact of prescribed rates called for by *Permian* had not been made in this case by the Commission.

Therefore, the Court of Appeals expressed "serious misgivings about affirming the Commission" and did so only with affirmative statements that the Commission still may "set aside the present order pending further determination" (Continental Appendix A, pp. 56-57); that "affirmance" is not a "judgment that the supply problem is not serious enough to require immediate modification of the order herein sustained" (Continental Appendix A, p. 59); that "the Commission must explain the relationship between the level of service, the demand for service, and the price it sets" (Continental Appendix A, p. 68); that the "mandate" of the court should not "be interpreted to interfere with Commission action that would change the rates" (Continental Appendix A, p. 69); that, citing Section 16 of the Natural Gas Act (Act) and with emphasis supplied, the Commission had power to "rescind" its orders; and, that dissolution of the court's stay would be without prejudice to Commission power "to stay its own order or to take any

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[1] (Continued)
62d" therefore refers to Volume III of Part I, page 62d. Such page designations appear at the bottom of each page, and pages included in each of the volumes are shown in parentheses at the bottom of the cover of each volume of that Joint Appendix.

other appropriate action affecting this case" (Continental Appendix A, p. 70).

Thereafter, petitions for rehearing raised, *inter alia*, questions of whether an "affirmance" by the Court of Appeals could leave the Commission with unimpaired powers to stay, vacate, modify or rescind its orders, as contemplated by the court. The court thereupon directed the Commission to respond to the petitions and to two specific questions concerning (i) Commission authority to stay, modify or rescind an order that has been "affirmed"; and, (ii) equitable power of the court to "affirm" while preserving Commission powers "to stay, modify or rescind" an order.[2]

In response, the Commission (i) took the position that it would not "have authority to permit any *retroactive* increases or decreases in a rate order, unless authorized to do so by a court";[3] (ii) stated that extent of the court's "equitable powers" had not been decided, and the court had "full statutory power to authorize or instruct the Commission" to "reconsider" the record or "reopen the record" for specific purposes "without necessarily reversing the Commission and vacating the order for a new hearing"; (iii) noted the need for clarification of the court's

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[2] The full text of the questions posed by the Court of Appeals to the Commission is:

"(1) Whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.

"(2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify or rescind the order if the circumstances seem to make these actions advisable."

[3] Emphasis by the Commission.

intent to authorize "retrospective adjustments" in light of its "use of the words 'sustained in full'"; and, (iv) requested a "remand" so "that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion."

On June 16, 1970, the court entered its order denying the petitions for rehearing and also entered an opinion stating that "affirmance of the Commission's orders is structured so as to allow the Commission great flexibility" (Continental Appendix B, p. 1). The court stated:

> ". . . We wish to make crystal clear the authority of the Commission in this case to reopen *any* part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.
>
> "At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

"In all other respects, the original opinion of this Court is the final disposition of this appeal."[4]

On July 2, 1970, the Commission entered an order staying its own orders, effective upon dissolution of the Court of Appeals' stay. On July 14, 1970, the Court of Appeals issued its judgment as mandate, and the Commission stay thus is and remains in effect.

A motion presently pends before the Commission seeking (i) reopening of the proceeding in Docket No. AR61-2, (ii) consolidation of Docket No. AR61-2 with the Commission's Docket No. AR69-1 in which more current data as to natural gas demand and supply and as to related industry capital requirements have already been presented, and (iii) modification of the opinions and orders reviewed below in light of the record before the Commission in the reopened proceeding.

ARGUMENT

In the Court of Appeals, Bradco, *et al.*, sought express reversal of the Commission on a number of substantive issues and a remand expressly directing the Commission (i) to set aside the opinions and orders under review, (ii) to receive additional evidence, and (iii) to prescribe prices on the basis of current data as to demand, supply deficiencies and industry capital requirements. The Court of Appeals declined to grant the requested relief. Instead, the Court of Appeals adopted a disposition which would permit the Commission, in the first instance, to reconsider its opinions and orders fully, without express directives from the court, and to decide what further steps are warranted.

As set forth in their petition in No. 683 which presently pends before this Court, it is the position of Bradco, *et al.*,

[4] Continental Appendix B, pp. 2-3. Emphasis by the Court.

that the Court of Appeals committed reversible error in not reversing the Commission and formally remanding the case to the Commission with explicit directions to rescind the opinions and orders on review and to reconsider such opinions and orders on the basis of additional relevant and current evidence. Thus, Bradco, *et al.*, continue to pray for the relief sought in their petition in No. 683; however, notwithstanding the foregoing, it is their further position that MDG, AGD and NYPSC are each in error in their assertions, *inter alia*, that the Court of Appeals lacked the power, as such, to effectively withhold finality of a judgment of affirmance and by express terms in the court's June 16, 1970, opinion permit the Commission to reconsider its opinions and orders. In the discussion *infra* with respect to the validity of such disposition by the Court of Appeals, Bradco, *et al.*, do not waive the contentions set forth in their petition in No. 683, but, to the contrary, rely thereon.

Although declining to expressly reverse and remand, the Court of Appeals very obviously intended to leave the Commission the capability — as sought by the Commission's request for remand — to reconsider its orders as fully as on an application for rehearing and to consider anew motions for reopening or for leave to adduce additional evidence. The Commission had already reserved as subject to its own further orders, questions as to amounts collected subject to refund prior to October 1, 1968 (Continental Appendix D, pp. 186-187), and, under the disposition by the court below, amounts collected subsequent to October 1, 1968, under the stays entered by the Court of Appeals and the Commission, likewise are subject to further Commission order.[5] Thus, should the Commission find it in the

[5] As to the general authority of the court and the agency over such funds collected and being collected subject to refund and stay orders, see *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949).

public interest, the Commission may retrospectively or prospectively adjust the orders on review as they relate to or control these funds.

The funds in issue thus have been, are, and remain, limited to amounts so collected under the rates at issue *in this case*. The Commission orders here involved also have not become final as a result of the express terms in the Commission's opinion cited *supra*, and orders entered by the agency and the court below. Thus, contrary to assertions by MDG, AGD and NYPSC, questions involving "reparations," collateral modification of final "filed" rates, or "retroactive" changes of final rate orders are simply not presented because of, *inter alia*, the limits on "affirmance" prescribed below in the Court of Appeals' June 16, 1970, opinion. Similarly, "retroactive" increases above rates heretofore charged, collected and received for past periods also are not involved (*cf.* MDG Petition, pp. 16-17).

I. The Court of Appeals' Disposition Under the Opinion of June 16, 1970, Was Within Its Authority Under Section 19(b) of the Natural Gas Act

MDG, AGD and NYPSC argue that the Court of Appeals' disposition is wholly beyond the court's authority under Section 19(b) of the Act (MDG Petition, pp. 19-22; AGD Petition, pp. 9-10; NYPSC Petition; pp. 16-20). However, because of the express terms of the court's opinion of June 16, 1970, such argument is without merit. Although Bradco, *et al.*, submit that reversal and remand with express directions for rescission were and are required in this case,[6] the narrower, alternative, limited disposition on "equitable" grounds under terms of the court's June 16, 1970, opinion is not defective on the grounds of lack of power in a court

[6] See Petition in No. 683.

to so limit effect of its own expressions of "affirmance" of a Commission order.

MDG, AGD and NYPSC appear to argue as though there had been a final "affirmance" below without more, as though the court's opinion of March 19, 1970, stood as a final, unqualified "affirmance," and as though the express limits in the court's June 16, 1970, opinion had never been written.[7] Contrary to their arguments, however, the court did limit the effect of its March 19, 1970, opinion and holdings by designful terms in the June 16, 1970, opinion, clarifying its March 19, 1970, opinion and intentionally withholding any effects of an unqualified "judgment" of "affirmance" that might have barred required, unrestricted Commission reconsideration.

This case, therefore, simply does not present questions as to agency or judicial powers of "rescission" under Section 16 of the Act framed by MDG, or broadly drawn questions posed by MDG, by AGD and by NYPSC as to general agency powers to rescind or otherwise modify an agency order which has been affirmed without such express qualifications or limitations, as here. Section 19(b) of the Act empowers courts of appeals to "affirm, modify or set

[7] In this respect, the two questions stated by MDG, in particular, are not presented in this case (see MDG Petition, p. 1). MDG's first question is drawn as though the June 16, 1970, opinion, and express limits therein, had never been written by the Court of Appeals, and as though the court's holdings of June 16, 1970, rested upon a construction of Section 16 of the Act instead of Section 19(b) as expressly stated by the court. MDG's second question assumes the Court of Appeals held it has the power to fix rates "retroactively" and has conferred this "equitable power" upon the Commission. However, there are no such holdings below; the Court of Appeals withheld finality of its "affirmance," preserving the Commission's statutory authority to reconsider its orders; in so doing, the Court of Appeals referred to its "equitable powers" as a reviewing court under Section 19(b), not to any purported judicial authority to "reverse" rates "retroactively" (*cf.* MDG Petition, p. 3).

aside" a Commission order "in whole or in part," to order additional "evidence to be taken before the Commission . . . in such manner and upon such terms and conditions as to the court may seem proper"; and to enter stays of Commission orders. Significantly, in this instance, prior to entry of its June 16, 1970, opinion, the Court of Appeals had before it (i) renewals of motions under Section 19(b) for leave to adduce additional evidence before the Commission, (ii) petitions urging that finality of an unqualified "affirmance" must be withheld, and (iii) *the Commission's formal request for remand*. The Court of Appeals thus expressly limited its "affirmance" and made provision for continuation of stay by the agency, with the result that finality of an "affirmance" without qualification did not attach and Commission opportunity for reconsideration is preserved.

This Court has stated that authority of a Court of Appeals under a review statute similar to Section 19(b) of the Act does include "equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Company* v. *National Labor Relations Board*, 305 U.S. 364, 373 (1939). In that instance, a remand for further proceedings without reversal or setting aside of the agency order was sustained; and under similar readings, such remedies as "affirmance" coupled with express granting of motions for leave to adduce additional evidence also have been fashioned.[8]

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[8] See *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F.2d 49 (8th Cir. 1939); *Dolcin Corporation* v. *Federal Trade Commission*, 219 F.2d 742 (D.C. Cir. 1954), cert. den. 348 U.S. 981 (1955). See also *United States* v. *Brown*, 331 F.2d 362, 365 (10th Cir. 1964); *National Labor Relations Board* v. *Central Mercedita, Inc.*, 273 F.2d 370 (1st Cir. 1959).

Where a reviewing court so *expressly* fashions a remedy and so *expressly* limits its holdings, as in the June 16, 1970, opinion below, the "'. . . great principles of equity, securing complete justice, should not yield to light inferences or doubtful construction.'" *Porter* v. *Warner Holding Company*, 328 U.S. 395, 398 (1946) (citing *Brown* v. *Swann*, 10 Pet. (U.S.) 497 (1836)). See also *Arkadelphia Milling Company* v. *St. Louis Sw. Ry. Co.*, 249 U.S. 134 (1919); *United States* v. *Morgan*, 307 U.S. 183, 197 (1939). A conclusion expressed in *Ford Motor Company* v. *National Labor Relations Board, supra,* is pertinent:

> "There is nothing in the statute, or in the principles governing judicial review of administrative action, which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record, or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid." (305 U.S. at 375)

The language in the June 16, 1970, opinion harks back to a similar early reading of Section 19(b) of the Act in *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 128 F.2d 481 (7th Cir. 1942), in which the principles of the *Ford Motor Company* case were applied:

> ". . . In this respect the legislation is similar in its terms and purport to that governing orders of the Federal Trade Commission, the National Labor Relations Board, and various other administrative bodies. We have previously said in Century Metalcraft Corporation v. Federal Trade Commission, 7 Cir., 112 F.2d 443, that, under the Federal Trade Commission Act, 15 U.S.C.A. § 41 et seq., Congress has made a grant of original jurisdiction to the court to enforce, set aside or modify the Commission's order and that such power carries with it authority to vacate or modify our own judgment whenever good cause is shown. This is in

> accord with announcements of other jurisdictions. We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. Butterick Co. v. Federal Trade Commission, 2 Cir., 4 F.2d 910; Silver Co. v. Federal Trade Commission, 6 Cir., 292 F. 752; Chamber of Commerce v. Federal Trade Commission, 8 Cir., 13 F.2d 673; Federal Trade Commission v. Balme, 2 Cir., 23 F.2d 615, certiorari denied 277 U.S. 598, 48 S.Ct. 560, 72 L.Ed. 1007; Indiana Quartered Oak Co. v. Federal Trade Commission, 2 Cir., 58 F.2d 182." (128 F.2d at 484)

An "affirmance" without such limits, qualifications or other express definition by the reviewing court, therefore, is not presented by virtue of the opinion of June 16, 1970, in this case. While Bradco, *et al.*, submit that reversal and express directives were and are required, the narrower disposition below, leaving initial decision as to corrective action to the agency, was otherwise within the Court of Appeals' prerogatives under Section 19(b) of the Act. Different results compelling specific corrective Commission action are required in this case, but, nevertheless, MDG, AGD and NYPSC clearly err in asserting that the Court of Appeals was without power to so fashion the remedy explicitly provided in the court's June 16, 1970, opinion.

II. The Disposition Under the June 16, 1970, Opinion Does Not Present Conflicts With Decisions of this Court or of the Courts of Appeals

MDG, AGD and NYPSC also argue that the disposition below conflicts with holdings that (i) the Commission has

no power to award reparations, and (ii) filed rates effective by final or "affirmed" Commission action may not be set aside subsequently or collaterally (MDG Petition, pp. 16-17, 20; AGD Petition, pp. 9-10; NYPSC Petition, pp. 16-19). No such conflicts with decisions of this Court or of the Courts of Appeals are presented in light of the provisions of the court's June 16, 1970, opinion.

It is, of course, well settled that the Commission has no "reparations" powers, and that the "filed rate" principle applies under the Act.[9] It is also settled that agency orders which become final as a result of unqualified judicial affirmance, or otherwise by operation of law, generally are not subject to retroactive change or collateral modification.[10] In this case, however, no conflict with these constructions or principles results by virtue of the express, considered, terms of the June 16, 1970, opinion. As shown *supra*, the rates in issue have not become "final," and neither "reparations" nor "retroactive" ratemaking are thus involved.

Thus, the rates in issue in this case have never become "final" filed rates or otherwise made the "legal rate" by Commission action no longer subject to Commission reconsideration under Section 19(b) or judicial review under Section 19(b), in the sense these terms are used in cases cited by MDG, AGD and NYPSC.

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[9] As to these constructions, MDG, AGD and NYPSC correctly cite *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *State Corporation Commission of Kansas* v. *Federal Power Commission*, 215 F.2d 176 (8th Cir. 1954). See also *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe R. Co.*, 284 U.S. 370 (1932).

[10] As to these principles, MDG, AGD and NYPSC correctly cite *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U.S. 335 (1945); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

Asserted "conflicts" claimed by MDG, AGD and NYPSC, therefore, are not existent in light of the express terms of the court's order, which such terms preclude the result now claimed by such petitioners. The possible appearance of "conflict" in holdings was thereby deliberately and intentionally removed by the court below in terms qualifying its affirmance, withholding finality and otherwise precluding any operative effect of its judgment impairing Commission reconsideration of the opinions and orders on review. The questions of conflicts posed by MDG, AGD and NYPSC thus would only properly arise if the June 16, 1970, opinion had not been entered by the Court of Appeals.

III. NYPSC Does Not Present A Substantial Question Involving Commission Prescription of Area Rates

NYPSC sets forth a question concerning alleged "cushions" raising the "rate of return" (NYPSC Petition, p. 3, pp. 20-21). Such question actually pertains to a portion of the Commission's opinion involving rate design which was sustained below as fully supported by substantial evidence and required findings, and as consistent with the area rate methodology affirmed by this Court in *Permian*. The question, therefore, presents no issue involving conflict with opinions of this Court, of the Court of Appeals for the District of Columbia Circuit or of any other court; and the question does not warrant review here on any ground asserted by NYPSC.

In *Permian*, this Court sustained Commission use of "non-cost" economic factors in prescribing "area rates," particularly if there were known imperfections or other recognized deficiencies in any "cost" data used. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 791, 815 (1968). These and other steps in the Commission's methodology do not

involve "cushions," "bonuses" or "boosts" of the "rate of return" despite NYPSC's artful labeling. As correctly found below (Continental Appendix A, pp. 27-28, footnotes omitted):

> "Even if we were to construe this case [the *Williams* case cited by NYPSC] as broadly disapproving noncost elements, the application to the sprawling, wildcatting gas producing industry of principles developed in regulating bus and telephone companies would require major adjustments. But this is not the extent of our disagreement with the argument advanced by these intervening parties. We do not understand the law of industry regulation, including the Williams case, to prohibit noncost elements that are based upon appropriate grounds. In *Permian*, the Supreme Court unequivocally stated that the FPC is not bound by the sum of cost and return even if it adopts costs as the primary basis of its calculations. The most persuasive reason for this rule is that cost pricing is circular. Past production has taken place at a given level; if a regulatory body fixes prospective prices at the cost of that production, it may be freezing the level of production, too. We think that the need for dramatically increased production from Southern Louisiana justifies the noncost factors added here, and that the FPC has power to include noncost elements that reflect its assessment of the need to use price as a tool to influence such economic relations. These are propositions that apply generally to regulation of utilities and quasi-utilities."

The court below also disposed of each of NYPSC's specific arguments by reference to the Commission's findings and the record. Repetition of the same arguments here does not present an issue differing from questions disposed of by *Permian* or now warranting another review by this Court.

IV. Disposition Under the Opinion of June 16, 1970, Permits A Result Consistent With the Public Interest and Commission Responsibility for Natural Gas Supply

MDG, AGD and NYPSC each argue, with differing language and emphasis, that Commission reconsideration under the Court of Appeals' opinion of June 16, 1970, necessarily is, or may produce results, contrary to the public interest and the Act's standards (MDG Petition, pp. 13-14, 20-22; AGD Petition, pp. 7-8; NYPSC Petition, pp. 14-15, 17-20). This is not correct. Commission reconsideration and corrective action are urgently required;[11] and, in any event, the disposition below permits the responsible regulatory agency to consider the relevant facts now available and make the determinations in the first instance which now vitally affect current and future area and national gas supply.

Numerous documents presented below and in this Court emphasize facts emergent since 1968 reflecting a present critical shortage of natural gas.[12] A chain relationship is involved, requiring reference to demand, supply, exploratory efforts, capital required and capital actually available under the Commission's 1968 orders. The court below correctly recognized that the Commission should be the body to initially reassess these relationships. Before funds are dissipated under the orders of 1968 to pipeline companies and thence to AGD, MDG and other corporations or local government bodies not subject to the Commission's jurisdiction, the Commission thus is charged by the court with reconsidering those orders in light of new facts reflecting supply deficiencies and declining exploration, development and capital now required for exploration and production.

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[11] See Petition in No. 683.

[12] See e.g., Appendices to Petition of The California Company in No. 682.

The nature, size, cause and cure for a supply shortage and for rising capital needs also were not decided by the court below. That court correctly recognized that the interests of all affected parties, *and the public interest,* will be best served if the Commission is afforded the opportunity for reassessment of these facts before funds are paid over and passed on to AGD and MDG.

It is clear that neither MDG, nor AGD, nor NYPSC can conclusively argue or show that rates or "refunds" based on findings concerning stale data, obsolete assumptions and misconceptions of a plentiful gas supply are in "the public interest." The public interest in, and the Commission's responsibility for, an existent natural gas supply for consumers, as underscored in *Permian,* are inextricably intertwined, as recognized by the court below. As to the supply shortage and any related required modifications of the Commission's 1968 orders, the court declined to accept the *ipse dixit* of any of the parties as conclusive, but called for assessment by the administrative agency in the first instance. That assessment must be permitted (and required, if need be), and is, in and of itself, a step that is in the public interest.

As to the relevant facts that should now control prescription of area rates, the court below also left these for further (and new) agency findings. Neverthelsss, MDG, AGD and NYPSC call for a pretense that economic conditions of 1956, or even 1960, now exist as to demand, supply and capital requirements. Their arguments are presented without regard for the gas supply situation described by a unanimous Federal Power Commission as recently as September 18, 1970, in a decision in the *Hugoton-Anadarko Area Rate Proceeding,* FPC Docket No. AR64-1 (FPC Opinion No. 586, pp. 19-20, mimeo. ed.):

"In determining area rates we have been charged by the Court of Appeals for the Fifth Circuit with predicting the probable demand for gas, determining the desired level of supply and attempting to determine a price which will elicit that level of supply. *Southern Louisiana Area Rate Cases, supra.* The court noted that this task was difficult, but said it must nevertheless be attempted by the Commission.

"All major sources of energy in the United States are currently in short supply. Brown-outs have already occurred in some electric utility distribution areas. Restrictions on gas use have been imposed by distributors in a number of areas and are being considered in others. The stock-pile reserves of coal for electric utilities are below the level considered by the industry to be a safe operating margin. The installation of nuclear power plants has progressed more slowly than was forecast and it now appears that nuclear power will not be able to ease the increasing demand on fossil fuel for many years. Domestic oil reserves are declining. Low-sulphur coal and oil are in short supply. Desulphurization facilities are lagging behind projected demand to meet stringent air pollution standards, destined to grow more stringent in several major urban areas. Pipelines are unable to obtain the desired supplies of natural gas. In 1968, according to the statistics of the AGA, the national findings of natural gas fell below production. This occurred again to a greater degree in 1969, when only about 8.3 trillion cubic feet were added to reserves while production mounted to 20.6 trillion."

In the present case, an area supplying up to one-third of the nation's natural gas supply is involved, and, as petitioners say, "huge sums" also are involved. The critical situation recognized below was that the public interest now calls for Commission reconsideration of its 1968 orders, and reassessment of any dissipation of funds detrimental to exploratory efforts and area and national natural gas supply. It will be only after Commission reconsideration

and reassessment that any party (or court) can allege that the ultimate result is or is not in the public interest. Such Commission reassessment must be permitted, rather than thwarted as sought by MDG, AGD and NYPSC.

V. If the Disposition Under Its Opinion of June 16, 1970, Was Beyond the Power of the Court of Appeals, Then the Court of Appeals Should Be Given the Opportunity or Required to Reconsider Its "Affirmance"

As discussed *supra*, the Court of Appeals "affirmed" the Commission with express "misgivings" and on the assumption the Commission could and would reconsider its opinions and orders in the light of (i) deficiencies enumerated by the court, and (ii) the Commission's expressions of concern over gas supply. Thus, although "affirming" the opinions and orders under review, the Court of Appeals attempted to fashion a remedy leaving the Commission free to take such corrective steps as present circumstances and facts dictate, including rescission of the deficient opinions and orders.

If the "remedy" fixed by the Court of Appeals is *not* available as a matter of law, then the "affirmance" by the Court of Appeals resulted from and rests upon serious misinterpretation of the Act as to Commission powers to act despite the "affirmance." In view of the present gas supply emergency recognized by almost all of the parties below, if this Court (i) determines that the court below erred in its "remedy," (ii) and also does not reverse the erroneous opinions and orders of the Commission and the "affirmance" thereof, then this Court should (i) summarily remand this case to the Court of Appeals with instructions to direct the Commission to reopen the case and, after further proceedings and reconsideration and reassessment, enter such

orders as the Commission may deem to be in the public interest or, in the alternative, (ii) remand the case to the Court of Appeals with instructions to the court to reconsider its judgment in the light of this Court's finding that the "remedy" directed by the Court of Appeals is not available as a matter of law.

CONCLUSION

For the foregoing reasons, the petitions in Nos. 669, 691 and 692 should be denied.

Respectfully submitted,

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